NO. 57316-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER NEAMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PACIFIC COUNTY

The Honorable Donald Richter, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 2

Related Issues for this Court 3

C. STATEMENT OF THE CASE 5

1. **Charge, plea, and sentence alternative** 5

2. **Late petition to revoke, extension of community custody, and second motion to revoke.** 6

3. **Revocation hearing and Neaman's subsequent concerns regarding ineffective assistance**. 8

4. **Post-revocation sentencing and appeal** 9

D. ARGUMENT 12

1. **The trial court lacked authority to revoke the parenting sentence alternative because Neaman's term of community custody expired December 11, 2021**. 12

a. The SRA did not authorize the additional six-month community custody term, so revocation, and remand to serve a standard range sentence, were also unauthorized. 12

TABLE OF CONTENTS (CONT'D)

b. Revocation hearing counsel was also ineffective in failing alert the court that the six-month community custody extension was invalidly imposed and that therefore the trial court lacked the power to revoke the sentence alternative..... 25

2. **Counsel also provided ineffective assistance by agreeing to an offender score of seven, rather than two.**..... 28

E. CONCLUSION..... 35

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Fleming
142 Wn.2d 853, 16 P.3d 610 (2001) 26, 29

In re Pers. Restraint of Cadwallader
155 Wn.2d 867, 123 P.3d 456 (2005) 30

In re Pers. Restraint of Carle
93 Wn.2d 31, 604 P.2d 1293 (1980) 13

In re Pers. Restraint of Goodwin
146 Wn.2d 861, 50 P.3d 618 (2002) 13

In re Pers. Restraint of Nichols
120 Wn. App. 425, 85 P.3d 955 (2004) 31

In re Pers. Restraint of Yung-Cheng Tsai
183 Wn.2d 91, 351 P.3d 138 (2015) 26

State v. Aho
137 Wn.2d 736, 975 P.2d 512 (1999) 27

State v. Barbee
187 Wn.2d 375, 386 P.3d 729 (2017) 14, 18

State v. Beer
93 Wn. App. 539, 969 P.2d 506 (1999) 20, 21, 22, 23, 24

State v. Blair
57 Wn. App. 512, 789 P.2d 104 (1990) 32

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Blake
197 Wn.2d 170, 481 P.3d 521 (2021) 5, 9

State v. Crawford
159 Wn.2d 86, 147 P.3d 1288 (2006) 27

State v. Ervin
169 Wn.2d 815, 239 P.3d 354 (2010) 29, 31, 32

State v. Estes
188 Wn.2d 450, 395 P.3d 1045 (2017) 26, 27

State v. Evans
177 Wn.2d 186, 298 P.3d 724 (2013) 13

State v. Hultman
92 Wn.2d 736, 600 P.2d 1291 (1979) 20, 22

State v. Hunley
175 Wn.2d 901, 287 P.3d 584 (2012) 30

State v. Ibanez
62 Wn. App. 628, 815 P.2d 788 (1991) 13, 24, 27

State v. Kyllo
166 Wn.2d 856, 215 P.3d 177 (2009) 26

State v. Markovich
19 Wn. App. 2d 157, 492 P.3d 206 (2021)
review denied, 198 Wn.2d 1036 (2022) 30

State v. Marquette
6 Wn. App. 2d 700, 431 P.3d 1040 (2018) 29, 32, 33

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Mortrud
89 Wn.2d 720, 575 P.2d 227 (1978) 18, 19, 20, 21, 22, 24

State v. Sutherby
165 Wn.2d 870, 204 P.3d 916 (2009) 26

State v. Thomas
109 Wn.2d 222, 743 P.2d 816 (1987) 25

State v. Wallin
125 Wn. App. 648, 105 P.3d 1037 (2005) 13, 28

FEDERAL CASES

Strickland v. Washington
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 26

RULES, STATUTES AND OTHER AUTHORITIES

Former RCW 9.94A.120 (1994) 20, 22

Former RCW 9.94A.220 (1994) 24

Former RCW 9.95.230 19

Former RCW 9.95.231 19

RCW 9.41.040 10

RCW 9.94A 1

RCW 9.94A.030 ..... 17, 23

TABLE OF AUTHORITIES (CONT'D)

Page

RCW 9.94A.200 21

RCW 9.94A.501 17

RCW 9.94A.517 ..... 11, 34

RCW 9.94A.525 ..... 30, 31, 32

RCW 9.94A.637 24

RCW 9.94A.655 ..... 1, 3, 4, 5, 6, 7, 14, 15, 16, 17, 24

RCW 9.94A.701 17

RCW 9.94A.702 17

RCW 9.94A.703 15

RCW 9.94A.704 15

RCW 9.94B.040 21

RCW 9.94B.050 17

RCW 9.95.230 19

Sentencing Reform Act 1, 3, 12, 13, 29, 30

U.S. CONST. amend. VI 25

CONST. art. 1, § 22 25

A. INTRODUCTION

Appellant Christopher Neaman has struggled with substance use disorder for several years but wants to change and to be a father that his young son can look up to. The trial court revoked Neaman's parent sentencing alternative (RCW 9.94A.655) and imposed a standard range sentence of 60 months after Neaman, unfortunately, relapsed. But this Court must reverse and remand for vacation of the sentence for two distinct reasons.

First, the trial court lacked authority to revoke the parenting sentence alternative in April of 2022, because the 12-month term of community custody to which Neaman was sentenced had expired December 11, 2021. Therefore, the Sentencing Reform Act (SRA), chapter 9.94A RCW, did not authorize the sentence modification that added six months of community custody, during which the trial court revoked the sentence alternative and imposed 60 months of incarceration. In addition, appointed counsel was ineffective in failing to review

the court file and realize the community custody term expired in December of 2021 and therefore could not be extended further, and in failing to make this argument to the revocation court in April of 2022.

If this Court disagrees with that premise, however, Neaman is entitled to resentencing for a distinct reason: Defense counsel ineffectively agreed to an offender score of seven when the score should have been two. Defense counsel argued—and the trial court agreed—a 2011 Class C felony washed out. But, by the exact same reasoning, five other, older Class C felonies would have also washed out. Defense counsel was therefore ineffective when he agreed Neaman's offender score was seven rather than two. For this reason, this Court should reverse and remand for resentencing.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in revoking Neaman's parent sentencing alternative (PSA) and in sentencing him to the standard range, where Neaman had completed the term of

community custody initially imposed, before the Department of Corrections (DOC) moved to add the additional six-month term, and before the court entered an order lengthening the term.

2. Similarly, appointed counsel was ineffective in failing to argue to the revocation court that Neaman completed the term of community custody in December of 2021, that the SRA did not allow extension of the term, and that therefore the SRA did not allow the court in April of 2022 to revoke the PSA and to impose a standard range sentence.

3. Defense counsel at the post-revocation sentencing also deprived Neaman of his right to the effective assistance of counsel by agreeing to an offender score of seven rather than two.

Related Issues for this Court

1. If the sentencing court determines that an offender is eligible for the PSA and that such a sentence is appropriate, the court "shall waive imposition of a sentence within the standard sentence range and impose a sentence consisting of twelve months of community custody." RCW 9.94A.655(5). A

court may modify the PSA sentence only during that term of community custody. RCW 9.94A.655(8)(a). Here, where the original term of community custody had already expired, the trial court lacked authority to add an additional term of community custody, and therefore ultimately lacked authority to revoke the sentence alternative and impose a standard range sentence. Should this Court reverse and remand for vacation of the standard range sentence?

2. Defense counsel has a duty to provide effective assistance to their client, which includes the duty to investigate the case (including the most basic of actions, reading the court file) and to know the applicable law. Was appointed counsel ineffective in failing argue to the revocation court that Neaman completed the term of community custody in December of 2021 and that therefore the trial court lacked the statutory authority to revoke his sentence alterative in April of 2022?

3. As stated, defense counsel has a duty to provide effective assistance to their client, which includes the duty to

know the applicable law. Here, at a post-revocation, post State v. Blake[1] sentencing hearing, defense counsel argued the State failed to prove a 2011 class C felony had *not* washed out, an argument the trial court accepted. But counsel inexplicably failed to argue five older class C felonies also washed out during that same time period and agreed to an offender score that included the felonies that should have also washed out. Did counsel provide ineffective assistance in this respect, as well?

C. STATEMENT OF THE CASE

1. **Charge, plea, and sentence alternative**

Neaman, father to a young son, pleaded guilty to possession of methamphetamine with intent to deliver, alleged to have occurred on May 31, 2018. CP 1-5 (information and probable cause affidavit). He did so in exchange for a recommended sentence under RCW 9.94A.655 (parenting

[1] State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021).

sentencing alternative). See CP 9-24 (plea agreement and statement of defendant on plea of guilty).

After his arrest on the 2018 charge, Neaman had checked himself into a treatment facility where he could continue to care for his son. At the time of his December 11, 2020 plea, he had stayed clean more than two years. RP 11-13.

At sentencing that same day, the court sentenced Neaman to the recommended sentence of 12 months of community custody, which included the condition that he not possess or consume controlled substances. CP 28-29; RCW 9.94A.655(5).

2. Late petition to revoke, extension of community custody, and second motion to revoke

The State filed a petition to revoke the sentence alternative on December 14, 2021, more than 12 months after the trial court imposed the original 12-month term of community custody as a sentence. CP 37-41.[2] A related hearing was held January 21,

[2] DOC's own documentation indicates that the relevant community custody term expired on December 11, 2021. CP 38.

2022. RP 15. No one, including appointed defense counsel, notified the court that Neaman's community custody supervision period had expired December 11, even before the State's petition was filed.

The court did not revoke the sentence but, consistent with DOC's recommendation, it extended the period of community custody for six months.[3] RP 16-22.

On March 9, 2022, the State filed a "Motion and Affidavit" requesting an order to revoking the parenting sentencing alternative. It submitted additional documentation in support of revocation in the weeks that followed. CP 42-55.

[3] The PSA statute appears to authorize the sentencing court to bring the offender back to court, at the request of the court or a petitioner, and for the court to impose a six-month community custody extension. See RCW 9.94A.655(8)(a), (c). But the court may only do so "during the [original] period of community custody." RCW 9.94A.655(8)(a).

3. Revocation hearing and Neaman's subsequent concerns regarding ineffective assistance

A hearing on the motion occurred on April 15, 2022. Acknowledging setbacks in his recovery, Neaman admitted he used drugs. But he had arranged to reenter inpatient treatment, where his son could continue to reside with him and continue attending school as normal. RP 29-33.

The court nonetheless revoked the sentence alternative and scheduled a sentencing hearing. RP 23-50.

After the April hearing, Neaman sent a letter to the court expressing concerns about appointed counsel on various grounds. Specifically, counsel had barely communicated with Neaman before the hearing; was inadequately prepared for the hearing; did not allow Neaman to tell his side of the story; and, relatedly, failed to cross-examine the community corrections officer regarding certain misleading testimony about Neaman's employment situation and his son's difficulties in school. Further, Neaman wanted the court to understand that he had

wished to reenter treatment prior to the hearing, but that that same community corrections officer had discouraged him from seeking treatment until after a revocation hearing. RP 57-67.

The court appointed new counsel, who filed a reconsideration motion largely based on Neaman's pro se claims. Counsel's motion reiterated that revocation counsel did not adequately communicate with Neaman, failed to adequately cross-examine the community corrections officer, and inadequately presented Neaman's side of the story. CP 68-69.

The trial court said it would evaluate Neaman's claims by reviewing an audio recording of the April 2022 hearing. RP 56-58. After doing so, the court ultimately denied reconsideration. RP 59-61.

4. **Post-revocation sentencing and appeal**

The post-revocation sentencing hearing was continued several times so the parties could resolve matters related to Neaman's offender score, which had been affected by the Supreme Court's issuance of Blake in 2021. RP 61-63.

Post-revocation sentencing finally occurred in August of 2022. RP 64. The State argued Neaman's offender score was nine or more, whereas Neaman's counsel argued for an offender score of seven. RP 73.

The parties agreed six prior drug possession convictions did not count and that the State could not prove one of two alleged Utah burglary convictions. RP 71; CP 12, 27 (State-compiled list of prior convictions).

The also parties agreed Neaman had two additional class B burglary convictions, one from Utah and one from Washington, which both counted in his score. RP 68, 71; CP 12.

Defense counsel argued, however, that the State could not prove a 2011 second degree unlawful firearm possession conviction, a class C felony,[4] had not washed out before the current 2018 charge. The court appeared to agree. RP 65-77.

[4] RCW 9.41.040(2)(b).

Defense counsel also argued that a prior federal conviction for interstate transportation of stolen property (apparently misidentified as "money laundering" on the State's list) was not comparable to a Washington offense. Again, the court appeared to agree. RP 69-70.

Defense counsel agreed, however, that five other class C felonies *should* be included in the offender score. These were three counts of unlawful issuance of bank checks from 2003, reckless burning from 2004, and forgery (Utah, 2000). RP 67-71.

Based on the defense-urged offender score of seven, the trial court sentenced Neaman to 60 months of incarceration, the low end of the standard range. RP 80; CP 71; see RCW 9.94A.517 (drug offense sentencing grid, listing standard range for level II drug crime, at score of six to nine or more points, as 60 months plus one day to 120 months).

Neaman timely appeals. CP 74-75.

D. ARGUMENT

1. **The trial court lacked authority to revoke the parenting sentence alternative because Neaman's term of community custody expired December 11, 2021**.

The trial court lacked statutory authority to revoke Neaman's parent sentencing alternative in April of 2022 because the term of community custody to which he was sentenced expired on December 11, 2021, and the statute did not permit a six-month extension of the term. In addition, counsel at the April 2022 revocation hearing was ineffective in failing to alert the court that additional six-month community custody term was erroneously imposed and that therefore revocation was not permitted. This Court should reverse and remand for an order vacating the post-revocation standard range sentence.

a. The SRA did not authorize the additional six-month community custody term, so revocation, and remand to serve a standard range sentence, were also unauthorized.

No statute authorized the trial court to impose the additional six-month community custody term. Thus,

revocation, and remand to serve a standard range sentence, were also statutorily unauthorized.

It is fundamental that "[a] trial court only possesses the power to impose sentences provided by law." In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). "'When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered.'" State v. Wallin, 125 Wn. App. 648, 657-58, 105 P.3d 1037 (2005) (quoting Carle, 93 Wn.2d at 33); accord In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002). Power to sentence derives exclusively from statute. As such, sentence enforcement actions are also limited to the sanctions authorized by statute. State v. Ibanez, 62 Wn. App. 628, 631-32, 815 P.2d 788 (1991).

Evaluation of a specific provision of the SRA is matter of statutory interpretation, which this Court reviews de novo. State v. Evans, 177 Wn.2d 186, 191, 298 P.3d 724 (2013). This Court

discerns the legislature's intent "solely from the plain language" of the statute, "considering the text of the provision[,] the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole." Id. at 192. The rule of lenity applies, however, when a sentencing statute is ambiguous. State v. Barbee, 187 Wn.2d 375, 383, 386 P.3d 729 (2017). The reviewing court will then construe any ambiguity in favor of the defendant. Id.

Under RCW 9.94A.655, which governs the parenting sentence alternative, or PSA,

> If the sentencing court determines that the offender is eligible for a sentencing alternative under this section and that the sentencing alternative is appropriate and should be imposed, the court shall waive imposition of a sentence within the standard sentence range and *impose a sentence consisting of twelve months of community custody*[.]

RCW 9.94A.655(5) (emphasis added). As to what such community custody entails, under subsection that follows, "[w]hen a court imposes a sentence of community custody under this section"

> (a) The court may impose conditions as provided in RCW 9.94A.703 and may impose other affirmative conditions as the court considers appropriate.
>
> (b) The department may impose conditions as authorized in RCW 9.94A.704[.]
>
> (c) The department shall report to the court if the offender commits any violations of his or her sentence conditions.

RCW 9.94A.655(6).

Subsection eight is the only one that deals with modification and revocation of the sentencing alternative. Under RCW 9.94A.655(8),

> (a) The court may bring any offender sentenced under this section back into court at any time *during the period of community custody* [1] on its own initiative to evaluate the offender's progress in treatment, *or* [2] to determine if any violations of the conditions of the sentence have occurred.
>
> (b) At the commencement of such a hearing, the court shall advise the offender sentenced under this section of the offender's right to assistance of counsel and appoint counsel if the offender is indigent.
>
> (c) *If the offender is brought back to court, the court may modify the conditions of community custody or impose sanctions under (d) of this subsection,*

> *including extending the length of participation in the alternative program by no more than six months*.
>
> (d) The court may order the offender to serve a term of total confinement within the standard range of the offender's current offense *at any time during the period of community custody*, if the offender violates the conditions or requirements of the sentence or if the offender is failing to make satisfactory progress in treatment.
>
> (e) An offender ordered to serve a term of total confinement under (d) of this subsection shall receive credit for any time previously served in confinement under this section.
>
> (f) An offender sentenced under this section is subject to all rules relating to earned release time with respect to any period served in total confinement.

(Emphasis added.)

As the bracketed numbers suggest, at the request of (1) the court or (2) someone keeping track of violations, the statute authorizes the sentencing court to bring the offender back to court to determine if violations have occurred, and to impose a six-month community custody extension. RCW 9.94A.655(8)(a), (c). But, as the italicized language indicates,

the court may only do so "during the [original] period of community custody."[5] RCW 9.94A.655(8)(a). And "[c]ommunity custody" means "that portion of an offender's sentence of confinement in lieu of earned release time or *imposed* as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by [DOC]." RCW 9.94A.030(5).

Further, under RCW 9.94A.501(8), addressing DOC's supervision obligations, "[t]he period of time [DOC] is authorized to supervise an offender under this section may not exceed the duration of community custody specified under RCW 9.94B.050, 9.94A.701 (1) through (9) [including PSA], or 9.94A.702, except in cases where the court has imposed an exceptional term of community custody under RCW 9.94A.535."

[5] Considering the structure of the statute, the reference to "the period of community custody" refers back to that 12-month period imposed under RCW 9.94A.655(5).

According to the DOC's own documents, Neaman's term of community custody began on December 11, 2020, and ended on December 11, 2021, even before the State filed a petition asking that Neaman be called back into court. See CP 37-38 (attachments to prosecutor's December 14, 2021 petition). Thus, under the plain language of the PSA statute, specifically sections (5) and (8), the trial court lacked authority to add six months to Neaman's community custody term and, correspondingly, lacked authority to call him back into court in April of 2022 to revoke the sentence alternative.

But, to the extent there is any ambiguity in the statute, which Neaman does not discern, it should be resolved in his favor. Barbee, 187 Wn.2d at 383.

Several cases are also instructive. First, State v. Mortrud has been narrowed since the Supreme Court issued it, but it remains instructive in the present case. 89 Wn.2d 720, 575 P.2d 227 (1978). There, analogously to the present case, DOC filed a petition to revoke Mortrud's probation *after* expiration of a

probationary period. The revocation hearing was held even later. The trial court revoked probation. Mortrud appealed, arguing that the court no longer had the power to revoke the deferred sentence because the probationary period had expired. The Supreme Court agreed. Id. at 721, 724.

As the Supreme Court explained, former RCW 9.95.230 granted a trial court authority to revoke probation imposed under former RCW 9.95.231. And former RCW 9.95.230 provided, in pertinent part:

> The court shall have authority at any time *during the course of probation* to . . . revoke, modify, or change its order of suspension of imposition or execution of sentence[.]

Mortrud, 89 Wn.2d at 721.

Guided by the statutory language, the Supreme Court held that "RCW 9.95.230 operates to terminate the jurisdiction of the court over the defendant upon the expiration of the probationary period." Mortrud, 89 Wn.2d at 724. Thus, "the court shall have no authority to revoke, modify, or change its order of deferral of

execution of the sentence." Id.[6] The Supreme Court therefore reversed the revocation order. Id.

This Court distinguished Mortrud in State v. Beer, 93 Wn. App. 539, 969 P.2d 506 (1999), an appeal of an order revoking a Special Sex Offender Sentencing Alternative (SSOSA). But Neaman also prevails under Beer.

Beer pleaded guilty to a sex crime. The trial court imposed a "SSOSA" sentence on November 2, 1994. In other words, the trial court suspended the sentence and imposed conditions, including 36 months of community supervision, consistent with former RCW 9.94A.120(7) (1994). Beer, 93 Wn. App. at 541-42.

In October of 1997, Beer's community corrections officer submitted a report to the sentencing court alleging Beer had

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[6] Cf. State v. Hultman, 92 Wn.2d 736, 741, 600 P.2d 1291 (1979) ("*If the petition for revocation is filed within the suspension period* and a hearing thereon is thereafter held within a reasonable time . . . , the court does not lose its authority to revoke solely because the *hearing* date is beyond the termination of the probationary period.") (Emphasis added.)

failed to meet the original conditions. Beer's three-year term of community supervision expired on November 1, 1997. On October 29, within the 36-month community supervision period, the State filed a summons for a review hearing. At a November 21, 1997 review hearing, the sentencing court revoked the SSOSA. Id.

Relying on Mortrud, Beer argued the revocation was invalid because the revocation hearing itself needed to occur during the community supervision period. Otherwise, the court was left only with the power to impose a 60-day incarceration sanction under former RCW 9.94A.200 (currently codified as RCW 9.94B.040), which dealt with community supervision violations. Beer, 93 Wn. App. at 542.

This Court disagreed and held the trial court had the power to revoke Beer's sentence alterative. This Court's primary rationale appears to have been that the prosecutor had filed a summons for a review hearing "to review conditions of the sentence" *during* the 36-month community supervision period.

Beer, 93 Wn. App. at 541; see id. at 545 (discussing State v. Hultman, 92 Wn.2d 736, 600 P.2d 1291 (1979) (post-Mortrud case clarifying that revocation petition *filed within probationary term* preserved the right of the court to hold a hearing after the expiration of term)).

Under Beer, Neaman still prevails. In Neaman's case, the State filed a notice for a review hearing only after the expiration of the community custody period. The plain language of the statute, and Mortrud, control.

In Beer, this Court also focused on the specific nature of "community *supervision*" and *may* have suggested (although it is unclear) that community supervision may, in fact, extend beyond the period denoted in a judgment and sentence. As noted in Beer, 93 Wn. App. at 543, former RCW 9.94A.120(7)(a)(v), governing the applicable sentence alternative, provided in part that

> [t]he court may revoke the suspended sentence at any time during the period of community supervision and order execution of the sentence if:

> (A) The defendant violates the conditions of the suspended sentence, or (B) the court finds that the defendant is failing to make satisfactory progress in treatment.

This Court then stated, "[t]he operative language in the sentencing statute is 'revoke . . . during the period of community supervision.'" Beer, 93 Wn. App. at 543 (alteration in original). "'Community supervision' is defined as 'a period of time during which a convicted offender is subject to crime-related prohibitions and other sentence conditions imposed by a court[.]'" Id. at 543-44 (citing former RCW 9.94A.030(7) (1994)). Based on the specific definition of community supervision, the revocation provision "authorizes revocation of the suspended sentence at any time in the course of the offender's time period in which he is subject to crime-related and other prohibitions." Beer, 93 Wn. App. at 544. And, technically, a sentencing court had jurisdiction over a defendant until he obtained a certificate of discharge under former RCW 9.94A.220

(1994).[7] Beer, 93 Wn. App. at 542-43; cf. Ibanez, 62 Wn. App. at 632 ("while the trial court here retained jurisdiction to take action, the actions permitted under the former statute did not include extension of community supervision beyond [two] years"). This case does not involve community supervision. Rather, it involves a term of community custody, which had expired even before the State filed the petition requesting that Neaman be brought before the court.

Further, as this Court recognized in Beer, a sentencing court can only impose the sanctions authorized by statute, and *as* authorized by statute. Beer, 93 Wn. App. at 543; see also Ibanez, 62 Wn. App. at 631-32. The PSA statute only allows revocation to occur by a set mechanism and only during the term of community custody, which had expired. RCW 9.94A.655(8).

In summary, the plain language of the PSA statute, considered in light of Mortrud, controls. The trial court lacked

[7] That statute is currently codified at RCW 9.94A.637 in significantly expanded form.

the statutory authority to extend Neaman's term of community custody in January of 2022 based on a tardy December 14, 2021 petition. Therefore, the April 2022 trial court lacked the authority to revoke Neaman's sentence alternative and to sentence him within the standard range.

b. Revocation hearing counsel was also ineffective in failing alert the court that the six-month community custody extension was invalidly imposed and that therefore the trial court lacked the power to revoke the sentence alternative.

For similar reasons, counsel at the April 2022 revocation hearing was ineffective in failing to alert the court that the additional six-month community custody term was invalidly imposed and that therefore that, as of April, the court lacked the power to revoke the sentence alternative.

The federal and state constitutions guarantee defendants the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

A claim of ineffective assistance of counsel presents a mixed question of fact and law that this Court reviews de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); accord Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

A defendant demonstrates they received ineffective assistance when they show (1) counsel's representation was deficient, and (2) counsel's deficient representation prejudiced them. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). Neaman meets both requirements.

This Court will deem counsel's performance deficient if it is not objectively reasonable. State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Counsel's failure to conduct appropriate research and investigation falls below an objective standard of reasonable attorney conduct. See id. at 460 (discussing duty to conduct research) (citing In re Pers. Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351 P.3d 138 (2015); State v. Kyllo, 166 Wn.2d 856, 868, 215 P.3d 177 (2009); State

v. Crawford, 159 Wn.2d 86, 91, 99, 147 P.3d 1288 (2006); and State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999)).

A defendant shows prejudice where there is a reasonable probability that the outcome of the proceedings would have been different if counsel had not performed deficiently. See Estes, 188 Wn.2d at 458. Reasonable probability is lower than a preponderance standard; Neaman need only "undermine confidence in the outcome" of proceedings. Id.

Neaman can show both deficiency and prejudice. A trial court cannot extend a period of community custody beyond that authorized by statute, or in a manner that is not authorized by statute. See Ibanez, 62 Wn. App. at 632. Considering this well-established legal rule, it was unreasonable for counsel not to be aware of this. Additionally, it was unreasonable to fail to review the court file and realize that the community custody term had expired in December of 2021, before the State's initial revocation petition was filed. Counsel should have argued the additional

six-month term was invalid and that revocation could not proceed.

As for prejudice, as demonstrated above, this was a meritorious argument, and the trial court was likely to have dismissed the revocation motion, had counsel made the argument. When a sentence lacking legal authority has been imposed, the trial court has the power and duty to correct the erroneous sentence. Wallin, 125 Wn. App. at 657-58.

Neaman prevails on the merits. He also prevails because he was denied the effective assistance of counsel at the revocation hearing. This Court should vacate the sentence.

2. Counsel also provided ineffective assistance by agreeing to an offender score of seven, rather than two.

Post-revocation sentencing counsel also provided ineffective assistance by agreeing to an offender score of seven, rather than two.

As stated, a defendant demonstrates they received ineffective assistance when they show (1) counsel's

representation was deficient, and (2) the deficient representation prejudiced them. Fleming, 142 Wn.2d at 865.

Neaman can demonstrate counsel performed deficiently in agreeing to an offender score of seven. Moreover, he can show prejudice—the trial court declined to include the 2011 firearm conviction based on the same washout argument that would have applied equally to the other five class C convictions.

Before turning to the elements of the ineffectiveness claim, this brief incorporates, for context, a discussion of the complicated law related to offender scores and "washout" of prior convictions.

Evaluation of the SRA's washout provisions is a matter of statutory interpretation, which this Court reviews de novo. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). When interpreting a statute, this Court gives effect to the statute's plain meaning when it can be determined from the statute's text. State v. Marquette, 6 Wn. App. 2d 700, 703, 431 P.3d 1040 (2018).

The State bears the burden of proving an offender's prior criminal history, including foreign convictions, by a preponderance of the evidence. State v. Hunley, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012). This includes the burden to prove that prior convictions have *not* washed out for the purpose of calculating a defendant's offender score. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876-78, 123 P.3d 456 (2005).[8]

Convictions for simple drug possession, from within and without Washington state, are no longer considered comparable to any valid, non-void Washington offense. State v. Markovich, 19 Wn. App. 2d 157, 174, 492 P.3d 206 (2021), review denied, 198 Wn.2d 1036 (2022).

Simple possession convictions also no longer prevent washout of other convictions under the SRA. Under RCW 9.94A.525(2)(c), "class C prior felony convictions other than sex

[8] Further, "[t]he best evidence of a prior conviction is a certified copy of the judgment," although other comparable documents may suffice. Hunley, 175 Wn.2d at 910.

offenses shall not be included in the offender score if, [1] since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, [2] the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction."[9]

As suggested by the inserted numbering, Washington courts have broken the provision into two clauses: First, a "'trigger[ ]'" clause, which identifies the beginning of the five-year period; and second, a "continuity/interruption" clause, which sets forth the substantive requirements an offender must satisfy during the five-year period to avoid interruption. Ervin, 169 Wn.2d at 821 (quoting In re Pers. Restraint of Nichols, 120 Wn. App. 425, 432, 85 P.3d 955 (2004)).

[9] In contrast, class B felony convictions other than sex offenses wash out only after 10 years in the community. RCW 9.94A.525(2)(c).

In Ervin, the Supreme Court, analyzing what sort of event would interrupt the five-year period, stated, "we hold that time spent in jail pursuant to violation of probation stemming from a misdemeanor does not interrupt the washout." Ervin, 169 Wn.2d at 826. In contrast, confinement stemming from a *felony* would reset the "trigger" date. Id. at 825; State v. Blair, 57 Wn. App. 512, 515-17, 789 P.2d 104 (1990).

In Marquette, employing the trigger/interruption framework from Ervin, the Court of Appeals held a crime that is not comparable to a Washington crime does not interrupt the washout provision of RCW 9.94A.525(2)(c)—either by restarting of the relevant period, the trigger date, or by interrupting the washout period under RCW 9.94A.525(2). Marquette, 6 Wn. App. 2d at 707. The Court stated:

> Here, the trial court correctly concluded that the 2007 California conviction was not comparable to a Washington crime and therefore could not be included in his offender score. Under the same reasoning, that crime is not a comparable Washington crime for purposes of the washout

> statute—*for either the trigger clause or the continuity/interruption clause*.

Id. (emphasis added).

In the present case, turning first to "trigger" analysis, the trial court appeared to agree—correctly—that the State did not prove the 2011 firearm possession conviction *did not* wash out. In other words, the State had not proven *when* Neaman was released on the 2011 conviction, and therefore had not demonstrated five years in the community had not passed. CP 65-67.

As far as continuity/interruption, the State also could not prove that, consistent with Marquette, the 2017 simple possession conviction prevented washout. Everyone also appeared to agree with this premise. RP 65-67.

But defense counsel inexplicably did not argue that Neaman's other five class C felonies (from 2000, 2003, and 2004) also washed out during the same five-year period that the

2011 firearm conviction would have washed out, based on the exact same rationale. This was deficient.

Thus, Neaman has shown deficient performance. He can also show prejudice. Had counsel argued that the other five convictions should have washed out, the trial court was likely to have agreed—the argument relied on the exact same premise Neaman prevailed on. Further, had counsel made the appropriate argument regarding the other five convictions, the trial court would have calculated his offender score as two based on two prior class B felonies, making the standard range much lower, that is, 12 months plus one day to 20 months. See RCW 9.94A.517 (drug offense sentencing grid). Neaman has also shown prejudice.

Neaman was denied effective assistance of counsel. If Neaman does not prevail on the claim raised in section 1, above, this Court should reach this issue and determine that Neaman received ineffective assistance at sentencing and remand for resentencing.

E. CONCLUSION

The trial court erred in revoking Neaman's parenting sentencing alternative and in sentencing him to the standard range. Neaman had completed the term of community custody initially imposed, and the statute did not allow for imposition of the extended community custody period, during which the sentencing alternative was revoked. Similarly, April 2022 revocation hearing counsel was ineffective in failing to argue to the revocation court that Neaman had completed the term of community custody in December of 2021. This Court should remand for the trial court to vacate the standard range sentence.

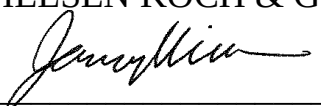
Should this court disagree, however, resentencing is required because counsel at the post-revocation sentencing hearing also deprived Neaman of his right to the effective assistance of counsel by agreeing to an offender score of seven rather than two. In the event that Neaman does not prevail on the first argument, resentencing is required.

I certify this document contains 5,551 words excluding those portions exempt under RAP 18.17.

DATED this 17th day of February, 2023.

Respectfully submitted,

NIELSEN KOCH & GRANNIS



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